***The Boeing Co.*, 365 N.L.R.B. No. 154 (Dec. 14, 2017)**

This case involves the legality of an employer policy, which is one of a multitude of work rules, policies and employee handbook provisions that have been reviewed by the Board using a test set forth in *Lutheran Heritage Village-Livonia*. In this case, the issue is whether Respondent's mere maintenance of a facially neutral rule is unlawful under the *Lutheran Heritage* "reasonably construe" standard, which is also sometimes called *Lutheran Heritage* "prong one" (because it is the first prong of a three-prong standard in *Lutheran Heritage*). Thus, in *Lutheran Heritage*, the Board stated:

> [O]ur inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) *employees would reasonably construe the language to prohibit Section 7 activity*; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Most of the cases decided under *Lutheran Heritage* have involved the *Lutheran Heritage* "reasonably construe" standard, which the judge relied upon in the instant case. Specifically, the judge ruled that Respondent, The Boeing Company (Boeing), maintained a no-camera rule that constituted unlawful interference with the exercise of protected rights in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA or Act).

Boeing designs and manufactures military and commercial aircraft at various facilities throughout the United States. The work undertaken at Boeing's facilities is highly sensitive; some of it is classified. Boeing's facilities are targets for espionage by competitors, foreign governments, and supporters of international terrorism, and Boeing faces a realistic threat of terrorist attack. Maintaining the security of its facilities and of the information housed therein is critical not only for Boeing's success as a business--particularly its eligibility to continue serving as a contractor to the federal government--but also for national security.

Boeing maintains a policy restricting the use of camera-enabled devices such as cell phones on its property. For convenience, we refer to this policy (which is contained in a more comprehensive policy Boeing calls "PRO-2783") as the "no-camera rule." Boeing's no-camera rule does not explicitly restrict activity protected by Section 7 of the Act, it was not adopted in response to NLRA-protected activity, and it has not been applied to restrict such activity. Nevertheless, applying prong one of the test set forth in *Lutheran Heritage*, the judge found that Boeing's maintenance of this rule violated Section 8(a)(1) of the Act. Based on *Lutheran Heritage*, the judge reasoned that maintenance of Boeing's no-camera rule was unlawful because employees "would reasonably construe" the rule to prohibit Section 7 activity. In finding the no-camera rule unlawful, the judge gave no weight to Boeing's security needs for the rule.

The judge's decision in this case exposes fundamental problems with the Board's application of Lutheran Heritage when evaluating the maintenance of work rules, policies and employee handbook provisions. For the reasons set forth below, we have decided to overrule the Lutheran Heritage "reasonably construe" standard. The Board will no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee "would reasonably construe" a rule

to prohibit some type of potential Section 7 activity that might (or might not) occur in the future. In our view, multiple defects are inherent in the Lutheran Heritage test:

- The "reasonably construe" standard entails a single-minded consideration of NLRA-protected rights, without taking into account any legitimate justifications associated with policies, rules and handbook provisions. This is contrary to Supreme Court precedent and to the Board's own cases.
- The *Lutheran Heritage* standard, especially as applied in recent years, reflects several false premises that are contrary to our statute, the most important of which is a misguided belief that unless employers correctly anticipate and carve out every possible overlap with NLRA coverage, employees are best served by not having employment policies, rules and handbooks. Employees are disadvantaged when they are denied general guidance regarding what standards of conduct are required and what type of treatment they can reasonably expect from coworkers. In this respect, *Lutheran Heritage* has required perfection that literally is the enemy of the good.
- In many cases, *Lutheran Heritage* has been applied to invalidate facially neutral work rules *solely* because they were ambiguous in some respect. This requirement of linguistic precision stands in sharp contrast to the treatment of "just cause" provisions, benefit plans, and other types of employment documents, and *Lutheran Heritage* fails to recognize that many ambiguities are inherent in the NLRA itself.
- The *Lutheran Heritage* "reasonably construe" test has improperly limited the Board's own discretion. It has rendered unlawful every policy, rule and handbook provision an employee might "reasonably construe" to prohibit *any* type of Section 7 activity. It has not permitted the Board to recognize that some types of Section 7 activity may lie at the periphery of our statute or rarely if ever occur. Nor has *Lutheran Heritage* permitted the Board to afford *greater* protection to Section 7 activities that are central to the Act.
- *Lutheran Heritage* has not permitted the Board to differentiate, to a sufficient degree, between and among different industries and work settings, nor has it permitted the Board to take into consideration specific events that may warrant a conclusion that particular justifications outweigh a potential future impact on some type of NLRA-protected activity.
- Finally, the Board's *Lutheran Heritage* "reasonably construe" test has defied all reasonable efforts to make it yield predictable results. It has been exceptionally difficult to apply, which has created enormous challenges for the Board and courts and immense uncertainty and litigation for employees, unions and employers.

Paradoxically, *Lutheran Heritage* is too simplistic at the same time it is too difficult to apply. The Board's responsibility is to discharge the "special function of applying the general provisions of the Act to the complexities of industrial life." Though well-intentioned, the *Lutheran Heritage* standard prevents the Board from giving meaningful consideration to the real-world "complexities" associated with many employment policies, work rules and handbook provisions. Moreover, *Lutheran Heritage* produced rampant confusion for employers, employees and unions. Indeed, the Board itself has struggled when attempting to apply *Lutheran Heritage*: since 2004, Board members have regularly disagreed with one another regarding the legality of particular rules or requirements, and in many cases, decisions by the Board (or a Board majority) have been overturned by the courts of appeals.

These problems have been exacerbated by the zeal that has characterized the Board's application of the *Lutheran Heritage* "reasonably construe" test. Over the past decade and one-half, the Board has invalidated a large number of common-sense rules and requirements that most people

would reasonably expect every employer to maintain. We do not believe that when Congress adopted the NLRA in 1935, it envisioned that an employer would violate federal law whenever employees were advised to "work harmoniously" or conduct themselves in a "positive and professional manner." Nevertheless, in *William Beaumont Hospital*, the Board majority found that it violated federal law for a hospital to state that nurses and doctors should foster "harmonious interactions and relationships," and Chairman (then-Member) Miscimarra stated in dissent:

> Nearly all employees in every workplace aspire to have "harmonious" dealings with their coworkers. Nobody can be surprised that a hospital, of all workplaces, would place a high value on "harmonious interactions and relationships." There is no evidence that the requirement of "harmonious" relationships actually discouraged or interfered with NLRA-protected activity in this case. Yet, in the world created by *Lutheran Heritage,* it is unlawful to state what virtually every employee desires and what virtually everyone understands the employer reasonably expects.

Under the standard we adopt today, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule. We emphasize that *the Board* will conduct this evaluation, consistent with the Board's "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy," focusing on the perspective of employees, which is consistent with Section 8(a)(1). As the result of this balancing, in this and future cases, the Board will delineate three categories of employment policies, rules and handbook provisions (hereinafter referred to as "rules"):

> • *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the "harmonious interactions and relationships" rule that was at issue in *William Beaumont Hospital*, [363 N.L.R.B. No. 162 (2016)] and other rules requiring employees to abide by basic standards of civility.[15]

---

[15] Although the *maintenance* of Category 1 rules (and certain Category 2 rules) will be lawful, the *application* of such rules to employees who have engaged in NLRA-protected conduct may violate the Act, depending on the particular circumstances presented in a given case.

To the extent the Board in past cases has held that it violates the Act to maintain rules requiring employees to foster "harmonious interactions and relationships" or to maintain basic standards of civility in the workplace, those cases are hereby overruled. As then-Member Miscimarra observed in his dissent in *William Beaumont Hospital*, such rules reflect common-sense standards of conduct that advance substantial employee and employer interests, including the employer's legal responsibility to maintain a work environment free of unlawful harassment based on sex, race or other protected characteristics, its substantial interest in preventing workplace violence, and its interest in avoiding unnecessary conflict that interferes with patient care (in a hospital), productivity and other legitimate business goals; and nearly every employee would desire and expect his or her employer to foster harmony and civility in the workplace. We do not believe these types of employer requirements, when reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights. However, even if basic civility requirements are viewed as potentially interfering with NLRA rights, we believe any adverse effect would be comparatively slight, because a broad range of activities protected by the NLRA are consistent with basic standards of harmony and civility; therefore, rules requiring workplace harmony and civility would have little if any adverse impact on these types of protected activities. Moreover, under the standard we announce today, when an employer lawfully maintains rules requiring employees to foster harmony and civility in the workplace, the *application* of such rules to

- *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

The above three categories will represent a classification of *results* from the Board's application of the new test. The categories are not part of the test itself. The Board will determine, in future cases, what types of additional rules fall into which category. Although the legality of some rules will turn on the particular facts in a given case, we believe the standard adopted today will provide far greater clarity and certainty to employees, employers and unions. The Board's cumulative experience with certain types of rules may prompt the Board to re-designate particular types of rules from one category to another, although one can expect such circumstances to be relatively rare.

We emphasize that Category 1 consists of two subparts: (a) rules that are lawful because, when reasonably interpreted, they would have no tendency to interfere with Section 7 rights and therefore no balancing of rights and justifications is warranted, and (b) rules that are lawful because, although they do have a reasonable tendency to interfere with Section 7 rights, the Board has determined that the risk of such interference is outweighed by the justifications associated with the rules. Of course, as reflected in Categories 2 and 3, if a particular type of rule is determined to have a potential adverse impact on NLRA activity, the Board may conclude that maintenance of the rule is *unlawful*, either because individualized scrutiny reveals that the rule's potential adverse impact outweighs any justifications (Category 2), or because the type of rule at issue predictably has an adverse impact on Section 7 rights that outweighs any justifications (Category 3). Again, even when a rule's *maintenance* is deemed lawful, the Board will examine circumstances where the rule is *applied* to discipline employees who have engaged in NLRA-protected activity, and in such situations, the discipline may be found to violate the Act.

The balancing of employee rights and employer interests is not a new concept with respect to the Board's analysis of work rules. For example, in *Lafayette Park Hotel*, the Board expressly stated that "[r]esolution of the issue presented by the contested rules of conduct involves 'working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society.'" Since *Lutheran Heritage*, the Board has far too often failed to give adequate consideration and weight to employer interests in its analysis of work rules. Accordingly, we find that the Board must replace the *Lutheran Heritage* test with an analysis that will ensure a meaningful balancing of employee rights and employer interests.

Applying these standards to the instant case, we find below that the Respondent's justifications for Boeing's restrictions on the use of camera-enabled devices on Boeing property outweigh the rule's

---

employees who engage in NLRA-protected conduct may violate the Act, which the Board will determine based on the particular facts in each case.

more limited adverse effect on the exercise of Section 7 rights. We therefore reverse the judge's finding that Boeing's maintenance of its no-camera rule violates Section 8(a)(1) of the Act.

* * *

D. Application of the New Standard to Boeing's No-Camera Rule

To determine the lawfulness of Boeing's no-camera rule under the standard we adopt today, the Board must determine whether the no-camera rule, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights, and if so, the Board must evaluate two things: (i) the nature and extent of the no-camera rule's adverse impact on Section 7 rights, *and* (ii) the legitimate business justifications associated with the no-camera rule. Based on our review of the record and our evaluation of the considerations described above, we find that the no-camera rule in some circumstances may potentially affect the exercise of Section 7 rights, but this adverse impact is comparatively slight. We also find that the adverse impact is outweighed by substantial and important justifications associated with Boeing's maintenance of the no-camera rule. Accordingly, we find that Boeing's maintenance of its no-camera rule does not constitute unlawful interference with protected rights in violation of Section 8(a)(1) of the Act. Although the justifications associated with Boeing's no-camera rule are especially compelling, we believe that no-camera rules, in general, fall into Category 1, types of rules that the Board will find lawful based on the considerations described above.

As stated above, the policy at issue here is Boeing's no-camera rule, which provides in relevant part as follows:

> Possession of the following camera-enabled devices is permitted on all company property and locations, except as restricted by government regulation, contract requirements or by increased local security requirements.
> However, use of these devices to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security:
>
> 5. Personal Digital Assistants (PDAs)
> 6. Cellular telephones and Blackberrys and iPod/MP3 devices
> 7. Laptop or personal computers with web cameras for desktop video conferencing, including external webcams.
> 8. Bar code scanners and bar code readers, or such devices for manufacturing, inventory, or other work, if those devices are capable of capturing images.

* * *

. . . [W]e find that the General Counsel failed to undermine the record evidence establishing the several purposes served by Boeing's no-camera rule's restrictions on the use of camera-enabled devices on its property, and we also find that those purposes constitute legitimate and compelling justifications for those restrictions. Indeed, many of the reasons why Boeing restricts the use of camera-enabled devices on its property provide a sobering reminder that we live in a dangerous world, one in which many individuals--foreign and domestic--may inflict great harm on the United States and its citizens.

Conversely, the adverse impact of Boeing's no-camera rule on NLRA-protected activity is comparatively slight. The vast majority of images or videos blocked by the policy do not implicate any NLRA rights. Moreover, the Act only protects concerted activities that two or more employees engage in for the purpose of mutual aid or protection. Taking photographs to post on social media for the purpose of entertaining or impressing others, for example, certainly falls outside of the Act's protection. It is possible, of course, that two or more Boeing employees might, in the future, engage in protected concerted activity--for example, by conducting a group protest based on an employment-related dispute--and Boeing's no-camera rule might prevent the employees from taking photographs of their activity. However, the no-camera rule would not prevent employees from engaging in the group protest, thereby exercising their Section 7 right to do so, notwithstanding their inability to photograph the event. Additionally, in the instant case, there is no allegation that Boeing's no-camera rule has actually interfered with any type of Section 7 activity, nor is there any evidence that the rule prevented employees from engaging in protected activity.

We find that any adverse impact of Boeing's no-camera rule on the exercise of Section 7 rights is comparatively slight and is outweighed by substantial and important justifications associated with the no-camera rule's maintenance. Accordingly, we find that Boeing's maintenance of the no-camera rule did not constitute unlawful interference with protected rights in violation of Section 8(a)(1) of the Act. . . .

MEMBER PEARCE, dissenting in part.

Overruling 13-year-old precedent, the majority today institutes a new standard for determining whether the maintenance of a challenged work rule, policy, or employee handbook provision is unlawful. Although characterized by the majority as a balancing test, its new standard is essentially a how-to manual for employers intent on stifling protected concerted activity before it begins. Overly protective of employer interests and under protective of employee rights, the majority's standard gives employers the green light to maintain rules that chill employees in the exercise of rights guaranteed by the National Labor Relations Act. Because the new standard is fundamentally at odds with the underlying purpose of the Act, I dissent. . . .

The Board and courts have long recognized that overbroad and ambiguous workplace rules and policies may have a coercive impact as potent as outright threats of discharge, by chilling employees in the exercise of their Section 7 rights. Accordingly, the Board, with court approval, has held that the mere maintenance of a rule likely to chill Section 7 activity can amount to an unfair labor practice even absent evidence of enforcement. In *Lutheran Heritage Village-Livonia,* the Board set forth an analytical framework for determining whether an employer rule or policy would reasonably tend to chill Section 7 activity. Under the *Lutheran Heritage* framework, the Board first considers whether an employer's rule "*explicitly* restricts activities protected by Section 7." "If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."

In the 13 years since it was adopted, the *Lutheran Heritage* standard has been upheld by every court to consider the matter. Furthermore, no party in this case has asked the Board to overrule *Lutheran Heritage* or to apply a different standard.

The majority's rationale for overruling *Lutheran Heritage* crumbles under the weight of even casual scrutiny. Its assertion that *Lutheran Heritage* "does not permit *any* consideration of the legitimate justifications that underlie many policies, rules and handbook provisions" (majority's emphasis) is demonstrably false, as is its assertion that *Lutheran Heritage* has not been well-received by the courts. The majority also disingenuously claims that the Board "has struggled when attempting to apply *Lutheran Heritage*" and that "Board members have regularly disagreed" regarding the legality of challenged rules. It fails to acknowledge, however, that most of the dissents are attributable to Chairman Miscimarra's personal disagreement with the test or the manner in which it has been applied. Once the majority's melodramatic flourishes and mischaracterizations are stripped away, what remains is a stratagem to greatly increase protection for employer interests to the detriment of employee Section 7 rights.[9]

Further, in upending the clear analytical framework in *Lutheran Heritage,* the majority announces a sweeping new standard for evaluating facially neutral work rules that goes far beyond the issues presented in this case. Moreover, it does so without seeking public input, and without even allowing the parties in this and other pending rules cases to be heard on whether the new standard is appropriate. Parties to this and the numerous pending cases are also denied the opportunity to introduce evidence on the application of the majority's new standard.

I agree with my dissenting colleague, Member McFerran, that the majority's new standard lacks a rational basis and is inconsistent with the Act. I also agree with her that, before the Board abandons or modifies a decade old standard, without prompting by adverse court precedent or any party to this case, it should notify the public and the parties that a reversal of important precedent is under consideration, solicit the informed views of affected stakeholders in industry and labor, and allow the parties to introduce evidence under the new standard.

That the new Board members eschewed a full and fair consideration of the issue is particularly troubling, given their representations in the confirmation process that they would approach issues with an open mind. The majority's rush to impose its ill-conceived test and its disregard for public input are revealed by its statement that it should not be bound by "fruitless marathon discussions" of the relevant legal principles and considerations. Is the majority convinced that the parties and the public have nothing to offer or is it afraid that it might learn that its emperor of a test has no clothes?
. . .

MEMBER MCFERRAN, dissenting in part.

*** * ***

---

[9] Taking a page out of a familiar playbook, the majority seeks to leverage a hyped-up fear of terrorism and a host of other conjured-up horribles to chip away at fundamental employee rights. I find particularly repellent the majority's unfounded suggestion that the Board's protection of Sec. 7 rights has left employees more vulnerable to sexual harassment and assault. This crude attempt to link *Lutheran Heritage* to sexual harassment and assault--for no discernible reason other than to appeal to emotion and fear--represents a new low in advocating for a position. There has never been--and I cannot even imagine--a case in which the Board would strike down a rule prohibiting sexual harassment, assault, or other workplace violence on the grounds that it interferes with the exercise of Sec. 7 rights. The majority's professed concern for the safety and well-being of employees--to justify weakening fundamental employee protections--is offensive and disrespectful to the victims of sexual harassment, assault, and other workplace violence.

The problem before the Board is how to address the fact that some work rules maintained by employers will discourage employees subject to the rules from engaging in activity that is protected by the National Labor Relations Act. An employee who may be disciplined or discharged for violating a work rule may well choose not to do so--whether or not a federal statute guarantees her right to act contrary to her employer's dictates. Not surprisingly, then, it is well established (as the *Lutheran Heritage* Board observed) "that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights." The aspect of the *Lutheran Heritage* test that the majority attacks is its approach to a subset of employer work rules that do "not explicitly restrict activity protected by Section 7" of the Act, were not "promulgated in response to union activity," and have not been "applied to restrict the exercise of Section 7 rights." For such rules, the *Lutheran Heritage* Board explained, the "violation is dependent upon a showing ... [that] employees would reasonably construe the language to prohibit Section 7 activity."

Thirteen years after this standard was adopted, the majority belatedly concludes that the Board was not permitted to do so, insisting that the "*Lutheran Heritage* 'reasonably construe' standard is contrary to Supreme Court precedent because it does not permit *any* consideration of the legitimate justifications that underlie many policies, rules and handbook provisions." This premise is simply false.

The Board has never held that legitimate business justifications for employer work rules may not be considered--to the contrary. As the Board recently explained in *William Beaumont*, responding to then-Member Miscimarra's dissent, the claim made by the majority here:

> reflects a fundamental misunderstanding of the Board's task in evaluating rules that are alleged to be unlawfully *overbroad*.
> * * *
> [T]he appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.
> * * *
> That a particular rule threatens to have a chilling effect does not mean, however, that an employer may not address the subject matter of the rule and protect his legitimate business interests. Where the Board finds a rule unlawfully overbroad, the employer is free to adopt a more narrowly tailored rule that does not infringe on Section 7 rights.
> * * *

When, in contrast, the Board finds that a rule is *not* overbroad - that employees would not "reasonably construe the language to prohibit Section 7 activity" (in the *Lutheran Heritage Village* formulation) - it is typically because the rule is tailored such that the employer's legitimate business interest in maintaining the rule will be sufficiently apparent to a reasonable employee . . . . Here, too, the *Lutheran Heritage Village* standard demonstrably does take into account employer interests. . . .

It is hard to know precisely what the majority's new standard for evaluating work rules *is*. The majority opinion is a jurisprudential jumble of factors, considerations, categories, and interpretive principles. To say, as the majority does, that its approach will yield "certainty and clarity" is unbelievable, unless the certainty and clarity intended is that work rules will almost never be found to violate the National Labor Relations Act. Indeed, without even the benefit of prior discussion, the majority reaches out to declare an entire, vaguely-defined category of workplace rules--those

"requiring employees to abide by basic standards of civility"--to be always lawful. That today's decision narrows the scope of Section 7 protections for employees is obvious. Put somewhat differently, the majority solves the problem addressed by *Lutheran Heritage* - how to guard against the chilling effect of work rules on the exercise of statutory rights - by deciding it is no real problem at all where a rule does not explicitly restrict those rights and was not adopted in response to Section 7 activity. . . .